



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Instrument Specialists, Inc.

File: B-279714

Date: July 14, 1998

Carl Payne Tobey, Jr., Esq., for the protester.
Darryl Bardusch, Esq., Maj. Michael J. O'Farrell, and Col. Nicholas P. Retson,
Department of the Army, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation requirements for monthly on-site maintenance tasks and relatively fast turn-around time for off-site repairs are unduly restrictive of competition is denied where record establishes that the requirements were reasonably designed to ensure that the agency's actual needs would be met.
2. Agency is not required to structure solicitation requirements to eliminate competitive advantages of offerors located closer to site of performance where advantages did not result from any unfair government action.

DECISION

Instrument Specialists, Inc. (ISI) protests the terms of solicitation No. DADA16-98-T-0162, issued by the Department of the Army as a total small business set-aside, for repair and maintenance of general and specialized surgical instruments. ISI contends that the specifications are unduly restrictive.

We deny the protest.

The solicitation contemplated the award of a fixed-price, requirements contract for a 6-month base period with four, 1-year options, under which the awardee will perform on-site repair and preventive maintenance on a monthly basis and off-site services on an as-needed basis. Off-site turn-around time may not exceed 15 working days. According to the statement of work (SOW), at 5:

Repair and preventive maintenance work shall include sharpening, adjusting, polishing, cleaning, realignment and replacement of parts that are lost, worn, or broken to like new condition on Government-owned general and specialized surgical instruments for Tripler

Regional Medical Center [Hawaii]; Oral Surgery Service . . . and all other services at Tripler.

Repair services also include guaranteed quality, color coding, etching and demagnetizing, reinsulation of laparoscopic instruments, and replacement of tungsten carbide inserts for needle holders. The contractor must provide all labor, transportation, equipment, materials, and supplies to accomplish the SOW requirements, and remove all materials it brings on-site after each service visit is completed.

Offers in response to the solicitation were due on April 7, 1998. Instead of submitting an offer, ISI filed this protest challenging various requirements as being unduly restrictive of competition. Specifically, ISI objects to the short duration of the base period; the requirements to clean and polish surgical instruments; the requirement to furnish a mobile unit to perform the contract;¹ the requirement for monthly service calls; and the 15 working day, off-site turn-around requirement. In ISI's view, these specifications, all of which represent changes from the requirements under the predecessor contract (which ISI held), are unduly restrictive with respect to all small businesses not located in Hawaii. In its comments on the agency report, ISI concedes that it "can perform in accordance with specifications as presently written, but at a cost, which will be predictably higher than a local contractor."

Agencies are required to specify their needs in a manner designed to promote full and open competition and thus may include restrictive requirements only to the extent necessary to satisfy their actual needs. 10 U.S.C. §§ 2305(a)(1)(A)(i), (B)(ii) (1994). We will not question an agency's determination of its actual needs unless that determination has no reasonable basis. Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Here, we find that the agency has demonstrated reasonable bases for the challenged requirements.

With regard to the 6-month base period, the agency explains that the period coincides with the remainder of the current fiscal year (April to the end of September) and is specified in order to fund the services with fiscal year 1998 appropriations. Since the term of contracts for services funded by annual

¹In order to perform the required on-site services, including replacement of tungsten carbide needle inserts, ISI claims that it will require a mobile unit. However, nothing in the solicitation requires contractors to furnish a mobile unit or any other vehicle to perform the services, and space has apparently been allocated for the contractor to perform on-site services. In the absence of a stated requirement, a contractor's choice to use a mobile unit to perform the contract is a matter of its business judgment which does not establish that a solicitation is unduly restrictive of competition.

appropriations shall not extend beyond the end of the fiscal year of the appropriation (Federal Acquisition Regulation (FAR) § 37.106), there is nothing unreasonable in the agency's decision. In this regard, ISI does not dispute the agency's obligation to follow FAR § 37.106; rather, ISI argues that it would not be economical for mainland offerors to submit proposals for such a short base period and suggests that the agency should wait until the beginning of the new fiscal year. These contentions are without merit. The fact that it may not be as economical for some offerors to compete does not render the agency's actions unreasonable. Further, as acknowledged by ISI, it has been nearly 2 years since the end of the predecessor contract. In view of this extended period without a regular contractor, it is not unreasonable for the agency to attempt to obtain services sooner, rather than later.

With regard to the requirement that the contractor clean and polish instruments, the agency explains that it listed these tasks in addition to others (sharpening, adjusting, realignment, etc.) to make clear what was entailed in repairing and maintaining instruments to "like new" condition. Again, ISI does not dispute that the instruments require cleaning and polishing as part of the refurbishing process. Rather, ISI observes that under its predecessor contract, government personnel cleaned and polished the instruments.² In ISI's view, since the agency possesses the necessary sonic washer to perform these tasks and has done so in the past, the contractor should not be required to perform these tasks. The agency explains that the contractor will not take over all routine cleaning, polishing, and sterilization of surgical instruments, but only that of instruments the contractor refurbishes. Since ISI itself concedes that cleaning and polishing are necessary, its mere disagreement

²ISI's objection stems from its predecessor contract. A new chief of Central Material Supply was assigned administration of that contract and he required ISI to clean the instruments it refurbished, including the removal of rust on the instruments. ISI objected to what it perceived as additional work and obtained a modification to its contract to allow the use of government-owned equipment. As a result of a dispute involving the last option under the predecessor contract, ISI filed an appeal at the Armed Services Board of Contract Appeals. ISI also perceived that the Chief had dealt with ISI in bad faith. Since this allegation concerns the administration of ISI's predecessor contract, we will not review it. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (1998). ISI also speculates that the Chief's bad faith resulted in the restrictive specifications. However, government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. In addition to producing credible evidence showing bias, the protester must demonstrate that the agency bias translated into action that unfairly affected the protester's competitive position. Id. Here, since the record establishes that the specifications represent the actual needs of the agency, there is no basis to infer bad faith.

with the agency's determination that it is more efficient for the refurbishing contractor to perform those tasks does not render that determination unreasonable. Aaron Refrigeration Servs., B-230833.2, Aug. 17, 1988, 88-2 CPD ¶ 153 at 4.

The Army explains that its need for monthly service is based on Tripler's increased surgical caseload and its status as a training hospital, both of which result in increased instrument use and breakage rates. Monthly service is necessary in order to provide quick turn-around time, maintain inventory control, and prolong the life of the surgical instruments. ISI complains that in the past, the agency's needs were met by two on-site visits per year. While ISI claims that nothing has changed at Tripler, it has submitted nothing to support its claims and has not shown that quick turn-around time, inventory control, and prolonged life of instruments are not desirable results that flow directly from more frequent maintenance. For example, the Army advises that a hip chisel may become dull after a single surgical procedure and the agency is unwilling to wait up to 6 months for it to be refurbished. As with the other requirements, ISI admits that it can perform monthly service and simply complains that the associated costs would make ISI noncompetitive with Hawaii-based contractors. ISI's desire to minimize its costs does not make the agency's determination of its needs unreasonable.

With regard to the 15 working day turn-around time for off-site repairs, the Army acknowledges that in past contracts, the turn-around time was 26 calendar days. The Army explains that, as with other instruments, efficiencies associated with quick turn-around time and inventory control are the basis for the off-site turn-around limit. While the off-site repair time is shorter than under the predecessor contract, the Army states that less time will be necessary for off-site work because of the requirement for monthly on-site service. This will result in smaller quantities of instruments requiring off-site service and lower freight costs associated with smaller quantities. Although ISI complains that the requirement leaves insufficient time to perform off-site maintenance and repair, it provides no supporting evidence, other than to assert that it may take up to 6 days for the instruments to be shipped one way. This is apparently based on ISI's past performance, which involved larger volumes of instruments. However, even if considerable time were required for shipment to and from Tripler, ISI has not explained why it would be incapable of performing services on fewer instruments in the remaining time. Instead, ISI simply complains that the reduced turn-around time will be more costly to, and thereby less competitive for, mainland offerors. In the absence of any evidence that the off-site turn-around time is unreasonably short, ISI's complaint provides no basis to conclude that the reduced time represents an unduly restrictive specification.

In sum, ISI's protest is based on its belief that as a mainland contractor, it is at a competitive disadvantage relative to Hawaii-based contractors. However, in seeking competition, an agency is not required to construct its procurements in a manner that neutralizes the competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances where the advantages

did not result from unfair action on the part of the government. MCA Research Corp., B-276865, July 29, 1997, 97-2 CPD ¶ 33 at 2-3. Here, the geographic advantages of local contractors relative to the protester have nothing to do with any unfair action on the part of the government. Moreover, notwithstanding ISI's unwillingness to submit a proposal because of its perception that its costs would be too high, the record reflects that the agency received more than one proposal from mainland contractors which were competitive both with those submitted by Hawaii contractors and with ISI's costs under the predecessor contract.

The protest is denied.

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the United States